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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

FCC 95-47

Allocation of Spectrum Below)
5 GHz Transferred from Federal)
Government Use)

ET Docket No. 94-32

To: The Commission

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COMMENTS OF LEACO RURAL TELEPHONE COOPERATIVE, INC.

LEACO RURAL TELEPHONE COOPERATIVE, INC.

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SUMMARY

Leaco Rural Telephone Cooperative, Inc. is a rural telephone company serving portions of eastern New Mexico and western Texas. In the instant NPRM the Commission seeks comments on proposed regulations to govern the new GWCS and procedures to award the new spectrum through a competitive bidding process.

The NPRM raises many issues with respect to the implementation of the competitive bidding process. Leaco's major concern which permeates these comments is that the auction process not result in the award of spectrum primarily to larger "deep pocket" players. If the services are to reach sparsely populated rural areas, the Commission cannot rely on market forces to determine the best possible use of the spectrum. In truly rural areas there are no market forces at work. If the license areas are smaller in size, rural telephone companies like Leaco would be able to acquire licenses without special considerations. As long as MTAs prevail, the Commission must take other action to ensure that rural areas obtain service.

Leaco proposes that the Commission allow "qualifying rural telephone companies" to acquire rural areas in which the winning bidder has certified that it has no plans to construct in three years directly from the auction winner. The qualifying rural telephone company would negotiate a purchase price with the licensee to acquire the area. Alternatively, Leaco seeks stricter buildout requirements that are geographically-based rather than population-based.

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Leaco Rural Telephone Cooperative, Inc. ("Leaco"), by its attorney, submit the following Comments in response to the Commission's "Second Notice of Proposed Rulemaking" in ET Docket 94-32 (released February 17, 1995) ("NPRM").

I. STATEMENT OF INTEREST

Leaco is a wireline telephone cooperative wholly-owned by its subscribers. Leaco provides landline telephone service, Basic Exchange Telecommunications Radio Service ("BETRS") and cellular service to rural parts of southeastern New Mexico and a portion of Loving county in west Texas.¹ Leaco filed comments in response to both the Notice of Inquiry² and the Notice of Proposed Rulemaking³ seeking

¹ The area served by Leaco covers approximately 4,500 square miles and is sparsely populated. There are only 900 telephone subscribers spread throughout this vast area which equates to approximately 2/10 of a customer per square mile. Telephone service to 57 of these subscribers could only be provided using fixed cellular service and four of these 57 subscribers must use solar power in order to receive telephone service because there is no commercial power source available.

² Notice of Inquiry, 9 FCC Rcd 2175 (1994).

³ Notice of Proposed Rulemaking, ET Docket No. 94-32, 9 FCC Rcd 6779 (1994) ("First NPRM").

to have the reallocated spectrum used for interactive voice, video and data use in rural areas. The rules adopted by the Commission to regulate the use of this spectrum and the procedures adopted by the Commission to award licenses for this spectrum will have a direct impact on Leaco and its subscribers. Accordingly, Leaco has a vested interest in the outcome of this proceeding.

II. BACKGROUND

Leaco has been providing telephone service for forty years. Leaco is extremely dedicated to providing quality service to its subscribers and attempts to meet the needs of its subscribers whenever possible. Within the last five years, Leaco has been approached by its subscribers, as well as educators⁴ and medical personnel⁵ in its service area, to provide interactive telecommunications services. Given that currently neither off-the-air television service nor cable television service are available to the majority of the population residing in Leaco's telephone service area,⁶ Leaco realized that it would have an uphill struggle to get its subscribers the services they

⁴ Leaco's service area contains five school districts with a total of 33 schools and approximately 730 teachers. The approximately 13,360 students enrolled in these schools do not receive the educational opportunities afforded to students living in urban and suburban areas. It is difficult to attract quality teachers to the area and the student population is not large enough to support an advanced curriculum.

⁵ Medical treatment facilities are severely limited. There are currently two medical treatment facilities in Leaco's service area. Medical emergencies require treatment at hospitals located in Lubbock, Texas -- a distance of 120 miles.

⁶ Two television translators with programming originating out of Albuquerque, New Mexico serve a tiny portion of the southeastern segment of Leaco's telephone service area.

requested.

Leaco investigated several methods of providing educational and medical interactive video services as well as providing entertainment video, voice and data services to its subscribers. Leaco determined that the cost of installing cable or fiber in this sparsely populated area is prohibitively expensive. In 1992, Leaco concluded that the only way to provide the advanced telecommunications services this area needs is through radio-based communications. Having exhausted the obvious spectrum-based sources for providing these services using current technology,⁷ Leaco views this proceeding as an opportunity to ensure the availability of the newly allocated 4660-4685 MHz spectrum in the General Wireless Service for the provision of interactive video, voice and data services to rural areas.

⁷ Leaco explored the possibility of providing students, medical personnel and subscribers with service using channels allocated to the Instructional Television Fixed Service ("ITFS") and Multichannel Multipoint Distribution Service ("MMDS"). However, it discovered that ITFS and MMDS spectrum was not available in its area because of mutual exclusivity with surrounding systems in more populated areas. Additionally, Leaco explored the possibility of providing interactive video service utilizing frequencies in the 28 GHz band. However, the Commission has initiated a rulemaking proceeding to determine whether sharing of the 28 GHz band between satellite and terrestrial uses is feasible or whether the band should be segmented, allowing exclusive use by either terrestrial or satellite services. See, Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 9 FCC Rcd 1394 (1994). Also, there has been some indication that these frequencies may be better suited for congested urban areas than for sparsely populated rural areas.

III. DISCUSSION

In "Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use," First Report and Order (ET Docket No. 94-32), released February 17, 1995 ("First R&O"), the Commission reallocated the 4660-4685 MHz spectrum for a new General Wireless Communication Service (GWCS) that includes both Fixed and Mobile Service uses.⁸ In the instant NPRM the Commission seeks comments on proposed regulations to govern the new GWCS and procedures to award the new spectrum through a competitive bidding process.

The NPRM raises many issues with respect to the implementation of the competitive bidding process. Leaco's major concern which permeates these comments is that the auction process not result in the award of spectrum primarily to large "deep pocket" players. Congress specifically intended that auction of the spectrum be made accessible to a broad range of entities when it mandated that the Commission's system of competitive bidding promote the following objectives:

- A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays; and
- B) the promotion of accessibility of new technology to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.
- C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
- D) efficient and intensive use of the electromagnetic

⁸ First R&O, paras. 41 - 54.

spectrum.

See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66. 107 Stat. 312 (approved August 10, 1993) ("the Reconciliation Act"), as codified at 47 U.S.C. § 309(j)(3) (emphasis added). As will be discussed more fully below, the FCC's tentative proposals disfavor the award of spectrum to rural areas and seek to tailor the competitive bidding process in a manner that favors the concentration of spectrum in the hands of a few large companies seeking to serve large urban markets. The Commission sold over \$ 7.7 billion worth of spectrum upon conclusion of its broadband PCS auction -- a major recovery of the use of the spectrum for the public. Surely, the FCC can now move to more middle ground by crafting rules that will allow new technologies to reach rural areas. If the services are to reach sparsely populated rural areas, the Commission cannot rely on market forces to determine the best possible use of the spectrum. In truly rural areas there are no market forces at work. Leaco realizes that this may create problems for the Commission's many economists, but the public interest cannot be sacrificed for the sake of economic theories. Leaco respectfully submits that under specific circumstances (i.e., in rural areas where competition does not exist) market forces do not ensure that spectrum is awarded to those who value it the most. By auctioning off large market areas, the Commission lumps rural areas where auctions would not be required because of the lack of mutually exclusive applications, with highly competitive urban areas where mutually exclusive applications are sure to exist. As discussed in its comments submitted in response to the First NPRM, Leaco proposes that entities proposing to provide service

to rural areas where competition does not exist should not be subject to competitive bidding.⁹

The following comments address, in order, the specific proposals set forth in the NPRM.

A. It Is Premature To Assign Specific Spectrum For Specific Services.

Leaco supports the Commission's proposal to exclude broadcasting services, radio location services and satellite services from the GWCS category. Inclusion of these services in the new category would limit the availability of the newly allocated spectrum for the uses for which it is intended -- interactive video, voice and data services.

Leaco opposes the alternative approach for designating services in the 4660-4685 MHz band that would prescribe rules that provide for utilization of the band only by specific services. It is far too premature to allocate spectrum for specific services. The Commission should allow the various GWCS services to develop before considering any allocations for specific services.

B. The GWCS Spectrum Will Be Primarily Used For Subscriber Based Services.

Leaco agrees with the Commission's tentative conclusion that the

⁹ Historically, rural telephone companies have been the only providers of telecommunications services in rural markets. Larger companies chose not to provide telephone service to these less economically desirable areas. Moreover, because of the small population base, rural areas simply cannot support more than one telecommunications service provider for any length of time. Leaco wishes to assure the Commission that its intent is not to discourage competition in its service area. Leaco merely wants to be able to provide new services to its subscribers who would otherwise never receive the services.

GWCS spectrum will be used for subscriber based services. In Leaco's rural service area, potentially the entire 25 megahertz could be used for the provision of interactive voice, video and data services to rural subscribers. These services will be provided exclusively in rural markets, and Leaco anticipates that there will be no competing licenses seeking to serve its rural area.

C. The Commission Must Ensure That Rural Areas Obtain Coverage When Developing Its Rules For The Assignment Of Spectrum.

Leaco anticipates that the principal use of the GWCS spectrum will involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. Sections 309(j)(1) and 309(j)(2) of the Communications Act of 1934, as amended, permit auctions to award licenses where mutually exclusive applications for initial licenses or construction permits are accepted for filing. Leaco is not opposed to the competitive bidding process in general; Leaco is opposed to the Commission's award of licenses to large geographic areas where only a handful of companies are able to acquire the licenses to serve -- companies who have traditionally excluded rural areas from their service areas. If the license areas are smaller in size, rural telephone companies like Leaco would be able to acquire licenses without special considerations. However, the Commission is insistent on using MTAs as the standard for awarding licenses. As long as MTAs prevail, the Commission must take other action to ensure that rural areas obtain service.

In its initial comments Leaco spelled out a plan that, if adopted

by the Commission, would allow services to reach rural America.¹⁰ In the NPRM, the Commission summarily dismissed Leaco's proposal stating that it would not "treat them differently than other applicants." NPRM at para. 83. By failing to treat rural telephone companies differently from larger companies, the Commission is failing to comply with the Congressional mandate embodied in the Communications Act -- ensuring "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." Accordingly, Leaco has revised its initial proposal and wishes the Commission to consider a variation.

Leaco proposes that the Commission allow "qualifying rural telephone companies" to file a map depicting its telephone service area prior to the auction. The auction winner must file a certification with the Commission stating whether it will serve the rural telephone service area within three years of award of the license. If the license winner has no plans to serve the rural area within three years of obtaining the license, the FCC should allow the "qualifying rural telephone company" the option to force the licensee to partition the area and assign the license for the rural telephone service area to the rural telephone company. Leaco is not suggesting that qualifying rural telephone companies not pay for the license. The qualifying rural telephone company would negotiate a purchase

¹⁰ Leaco Comments pp.7-9.

price with the licensee.¹¹

Leaco believes the following criteria should be used by the Commission in determining whether a rural telephone company qualifies for exempt status. The rural telephone company must serve fewer than 10,000 access lines and demonstrate that its proposed use of the service could boost productivity, create jobs, educate children or improve the provision of health care.¹² The rural telephone company should also demonstrate how it will extend service to unserved or underserved communities or extend educational opportunities and medical services to these areas.¹³ Leaco respectfully submits that this proposal will best ensure deployment of new radio-based

¹¹ In order to avoid any unjust enrichment, the maximum purchase price would be capped at the pro rata share of the winning auction bid for that market on a per POP basis. For example, if the rural area contained a population of 6,000 and the average price per POP in the MTA was \$15.00, then the rural telephone company would pay the licensee a maximum of \$90,000 (6,000 x \$15).

¹² These goals were established by the Commission in the Notice Of Inquiry, 9 FCC Rcd 2175 (1994) ("NOI") in ET Docket No. 94-32.

¹³ For example in Leaco's case, its subscribers lack video, data and voice services. Leaco proposes to use the allocated spectrum to provide interactive video, voice and data services to its subscribers. Leaco's proposed interactive service will also extend educational opportunities by allowing teachers in larger communities and urban areas to instruct and interact with students in rural areas in real time. Similarly, the provision of medical services will be enhanced by allowing medical personnel in rural areas to receive real time instruction on both emergency and non-emergency medical procedures via video and voice communications. Likewise, data can be transmitted from the rural medical staff to medical personnel based in larger urban hospitals for evaluation and response. This interactive medical telecommunications technology will allow sick and injured patients to be treated closer to home without the need to travel long distances in order to receive proper medical attention. Leaco's proposed service would meet each of the policy goals established by the Commission and under the criteria proposed herein would make Leaco a qualifying rural telephone company.

technology to rural parts of the country.

D. Five MHz Channel Blocks With No Aggregation Cap Will Best Ensure That Interactive Services Are Available To Rural America.

The Commission proposes to license the available spectrum in five blocks, each of which would be five megahertz wide, and to limit a licensee to a total of three blocks (i.e. 15 megahertz) in a single geographic licensing area.¹⁴ An analog video channel requires six megahertz of spectrum. When digital compression technology is available, six to ten video channels are likely to fit within six megahertz of spectrum. A cap on the amount of GWCS spectrum used for interactive video transmissions as proposed by the Commission would be detrimental to rural providers, such as Leaco, seeking to use the technology for the provision of interactive video services in rural areas. Should the Commission adopt a fifteen megahertz cap, those seeking to provide services to rural areas should be exempt or alternatively be allowed to seek a waiver. There is precedent for exempting rural service providers from Commission rules. See e.g., 47 C.F.R. §63.58 (telephone common carriers exempt from cable-telephone crossownership rules when service is provided to rural areas).

E. Smaller License Areas Will Help Ensure That Interactive Services Are Available To Rural America.

With respect to the size of the geographic areas to be licensed, Leaco submits that the use of relatively small geographic areas will ensure coverage to rural areas. Smaller geographic areas will be more

¹⁴ NPRM at para. 77.

affordable to rural telephone companies and are more likely to represent the rural telephone company's service area. Leaco suggests that licenses for this spectrum be awarded using cellular Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs"). Use of MSAs/RSAs ensured the rapid deployment of cellular service across the country. For those service providers interested in serving larger areas, adjacent geographic areas could be consolidated to provide wider service. Use of large Major Trading Areas (MTAs) as proposed by the Commission¹⁵ will keep services out of rural America because the rural telephone company that traditionally provides telecommunications services to rural areas will not be able to afford to buy the entire MTA. The FCC's MTA proposal, coupled with the FCC's population-based rather than geographic-based build out requirement,¹⁶ gives the winning MTA auction winners little incentive to partition and license the rural area to the rural telephone company. Accordingly, smaller licensed areas will better serve the public interest.

F. Rural Telephone Companies Should Be Eligible To Hold GWCS Licenses Regardless Of Whether The License Is Obtained Through An Auction.

In the NPRM, the Commission stated that it will not allow rural telephone companies to obtain licenses without participating in an auction.¹⁷ Leaco requests that the FCC clarify that a rural telephone

¹⁵ NPRM at para. 79.

¹⁶ The issue of population-based construction requirements is discussed in Section J, infra.

¹⁷ NPRM at para. 83. The Commission was apparently not persuaded by Leaco's comments in response to the First NPRM that rural telephone companies should be exempted from the auction requirement in certain circumstances.

company may obtain licenses through a method other than an auction -- specifically, through a partial assignment of the license from the auction winner as provided for in Leaco's proposal discussed in Section C above, or alternatively, through the partitioning process as is currently provided for in the PCS competitive bidding rules. The partitioning issue is discussed in greater detail in Section G below.

G. Bidding Preferences Should Not Be Limited To Minorities and Women.

Leaco is concerned that the Commission's determination to use competitive bidding to award licenses may prohibit the use of the spectrum for any purpose whatsoever in rural America. Leaco respectfully submits that under specific circumstances (i.e., where competition does not exist) market forces do not ensure that spectrum is awarded to those who value it the most. As discussed in Section C above, Leaco proposes that the FCC allow "qualifying rural telephone companies" the option to force the winning licensee to partition the area and assign the license for the rural telephone service area to the rural telephone company when the license winners do not certify that they will serve the rural telephone service area within three years of award of the license. If the Commission does not adopt that proposal and adopts the MTA geographic licensing areas, rural telephone companies should be given all of the bidding preferences awarded to other members of the designated preference group. The Reconciliation Act directs the FCC to ensure that licenses for new technologies be awarded in a manner that promotes "the development and

rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays." Leaco submits that the following proposals will increase the likelihood that rural Americans will receive the benefit of new radio-based technologies.

1. Partial Assignment Of Licenses

Regardless of the size of the geographic service areas selected by the Commission, winning bidders should be given the flexibility to subdivide and license the market to another entity. The Commission can better ensure both service to rural America and participation of rural telephone companies by adopting policies which permit the voluntary partitioning of markets. By granting the joint requests of qualified rural telephone companies and licensees of any frequency block to partition the market, the Commission will foster both the provision of new radio services to rural areas and the participation by rural telephone companies in the provision of these new radio services.¹⁸ Accordingly, the Commission should adopt rules that state that such partitioning will be permitted and encouraged. Moreover, any anti-trafficking rules which the Commission may adopt should not apply to the assignment of partitioned areas. This will encourage and enable rural telephone companies to provide new radio-based technologies to rural America.

¹⁸ Leaco notes for the record that the rapid deployment of cellular service in the larger RSAs is partly attributable to the ability to partition the market among independent telephone companies.

2. Bidding Credits, Installment Payments and Reduced Upfront Payments Will Provide Incentives To Larger Companies To Form Partnerships With Rural Telephone Companies.

Bidding credits, installment payments and reduced upfront payments would assist rural telephone companies in bids for large MTAs. It is impossible for a rural telephone company to construct and operate a system licensed to serve an MTA on its own. A rural telephone company would need assistance from a larger company or consortia of companies to build out an MTA. Bidding credits, installment payments and reduced upfront payments are tools that rural telephone companies can use to attract larger companies as partners. The formation of such partnerships will ensure that rural telephone companies have control over and input into the roll out of service in rural areas.

H. The PCS Model Provides The Best Model For Establishing Technical Rules For The GWCS Band.

Leaco agrees with the Commission's approach to establish technical rules in the GWCS band. Flexibility is the key that will ensure the best possible development of GWCS technologies. Rural areas and urban areas present different requirements. Accordingly, Leaco suggests that the FCC allow licensees to request waivers of any technical rules adopted, provided the licensee can demonstrate good cause and overriding public concerns for the waiver.

I. Ten Year License Terms Are Appropriate.

Leaco agrees with the proposed ten year license term. A ten year term, when combined with a renewal expectancy such as that currently

utilized in the cellular radio services, will encourage investment in services utilizing the 4660-4685 MHz band.

J. Leaco Opposes the Adoption Of Population-Based Construction Requirements.

Leaco disagrees with the Commission's proposed construction requirements. The proposed requirements, which are based on population rather than geographic area, would allow a licensee to satisfy its construction obligations by serving a major metropolis in its service area and ignoring the rest of its territory. Leaco urges the Commission to adopt strict construction deadlines. Specifically, Leaco submits that the Congressional requirement to ensure service to rural America can be met only if all licensees are required to relinquish their rights to serve any portion of their licensed markets which are unserved at the end of a five-year period. Similar in approach to the Commission's cellular five-year fill-in rules, re-licensing unserved areas at the end of five years will ensure that rural areas of the country will not remain unbuilt and forever held captive by a disinterested licensee. Leaco strongly urges the Commission not to adopt population-based service benchmarks which provide no incentive for the provision of service to large rural areas of the country. A licensee may easily fulfill population-based service standards by concentrating on the densely populated portions of any particular market leaving the less populated rural areas unserved.

K. Applicants Should Be Permitted To Establish Their Own Regulatory Status Conditioned On FCC Approval.

The Commission seeks comment on how to determine the regulatory status of each licensee given that GWCS licensees will be permitted to provide a combination of fixed, mobile, private carrier or common carrier services. NPRM at para. 126. The Commission also seeks advice on whether it should develop a new general application form or allow the licensee to file the appropriate form depending on the type of service it plans to provide. NPRM at para. 127. The FCC has fairly clear definitions for determining what constitutes a fixed, mobile private carrier or common carrier service. However, mobile services are sometimes used on an ancillary basis as fixed services. For example, in the cellular radio service Rule Sections 22.323 and 22.901(d) permit licensees to provide fixed cellular service on an incidental or auxiliary basis provided the mobile service does not deteriorate as a result and the FCC is notified before hand. As a practical matter, neither the cellular licensee nor the Commission can easily determine whether cellular mobile phones are being used as a fixed or mobile service. Accordingly, Leaco suggests that licensees initiating a new service in the GWCS band first file a letter with the Commission notifying the Commission of the proposed service to be offered over the GWCS spectrum. The notification letter should be filed fifteen days before the licensee files its regular application for service. The notification should at a minimum include: (1) a description of the type of service or services the licensee intends to operate; (2) a statement indicating whether the service will be Fixed or Mobile and whether it will be offered as a commercial mobile radio

service, a private mobile radio service, a common carrier fixed service, or a private fixed service; and (3) the application form(s) that the licensee would file to obtain authorization to provide the service. The Commission would have fifteen days to review the licensee's proposal and notify the licensee if the licensee's characterization of the service is inaccurate. This intermediate step will allow more flexibility and save both the licensee and Commission staff time in processing inappropriately filed applications.

L. All Services Within The GWCS Band Should Be Subject To Section 309(d) And Section 310(d) Requirements.

The Commission seeks comment on whether some or all of the services licensed in the GWCS band should be subject to the public notice requirements (Section 309(d) of the Communications Act) and transfer/assignment requirements of Section 310(d) of the Communications Act.¹⁹ Initial applications for any service in the GWCS band should be placed on public notice for 30 days prior to grant to allow interested parties to file petitions to deny. This will allow the public to comment on whether the proposed service has been properly classified as Fixed or Mobile and whether it will be offered as a commercial mobile radio service, a private mobile radio service, a common carrier fixed service, or a private fixed service.

¹⁹ NPRM at paras. 128-129.

IV. CONCLUSION

The development of rules to govern a new radio service and the award of the radio licenses is an important responsibility requiring the Commission to closely examine the probable impact on the public interest, convenience and necessity. Consequently, the Commission must carefully examine its reasons for developing rules and for awarding licenses for new services to determine whether they will ensure that the Commission's overall policy goals are met. As set forth above, Leaco's proposed rules and methods of awarding licenses for the General Wireless Communications Services meets these policy goals. Accordingly, Leaco respectfully requests that the Commission adopt Leaco's proposed recommendations.

Respectfully submitted,

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